a new rule, the newspaper/broadcast cross-ownership rule cannot possibly be necessary in the public interest as the result of competition. As also shown below, the court decisions similarly make clear that, given recent changes to other rules and the fact that newspapers represent a class of media that is otherwise totally unregulated by the FCC, any action short of total repeal of the newspaper/broadcast cross-ownership rule would be arbitrary, capricious and a violation of Section 202(h) and the Administrative Procedure Act. In addition, the court decisions allow, indeed they even implicitly invite, the FCC to find that spectrum scarcity no longer exists. Once the FCC officially reaches this conclusion, the newspaper/broadcast cross-ownership rule inevitably must fail under any First Amendment review standards.

A. Section 202(h) Calls for Regulatory Reform and Establishes a More Exacting Standard for Retention Than For Promulgation of the Commission's Rules, a Standard That Requires Repeal of the Newspaper/Broadcast Cross-Ownership Rule.

The clear purpose of the 1996 Act was "to . . . reduce regulation."[59] In Section 202(h), Congress sought to have the FCC effectuate this purpose by directing the agency to determine whether any of its ownership rules are "necessary in the public interest as the result of competition" and ordered it to "repeal or modify any regulation" that is "no longer in the public interest."[60] As written, Section 202(h) clearly "carries with it a presumption in favor of repealing or modifying the ownership rules."[61] In addition, "[w]hat is clear from the legislative history of the 1996 Act is that Congress sought to compel the agency to reexamine longstanding rules that

[59] 1996 Act Preamble, 110 Stat. 56.

[60] Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 112 (1996).

[61] *Fox*, 280 F.3d at 1048.

had not been changed significantly for many years during which time the regulated industries had changed dramatically."[62]

In the *2002 NPRM*, the Commission asks how it should construe the word "necessary" in Section 202(h) -- as "essential" or "indispensable" or merely "useful" or "consistent with" the public interest as the result of competition.[63] Media General submits that the term must be interpreted as "essential" or "indispensable" for at least three reasons.[64] First, the broad deregulatory purpose for enacting Section 202(h), in which Congress rejected a "business as usual" approach to the FCC's ownership rules, clearly requires an interpretation that utilizes the plain meaning of the term "necessary" -- that is, interpreting the word in Section 202(h) as meaning "essential" or "indispensable." By its terms, Section 202(h) calls for "regulatory reforms," and, as a result, the FCC must justify its rules or repeal them. Moreover, as the *Fox* panel noted, other subsections of Section 202 already subjected the FCC's ownership rules to drastic cuts, and Section 202(h) requires the FCC to go beyond such changes.[65]

Second, interpreting the word "necessary" in Section 202(h) as meaning "essential" or "indispensable" rather than merely "useful" or "consistent with" comports with judicial construction of similar language elsewhere in the Telecommunications Act of 1996. For instance, in *GTE Services Corp. v. FCC*, 205 F.3d 416, 422 (D.C. Cir. 2000), the United States Court of Appeals for the District of Columbia Circuit recently held that when Congress used the word "necessary" in Section 251(c)(6) of the 1996 Act requiring physical or virtual collocation

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[62] FCC Petition for Rehearing or Rehearing En Banc, *Fox Television Stations, Inc. v. FCC*, No. 00-1222 (D.C. Cir.), filed Apr. 19, 2002, at 11 (citations omitted).

[63] *2002 NPRM* at ¶ 18.

[64] Frankly, it could be argued that the rule also fails to be necessary in the public interest as the result of competition under the lesser standards of "useful" or "consistent with."

[65] *Fox*, 280 F.3d at 1033.

for carriers competing with incumbent local exchange carriers, it meant "required" and that the FCC erred when it interpreted the word "necessary" to mean simply "useful."[66] As the court stated, "[s]omething is necessary if it is required or indispensable to achieve a certain result."[67] In support, the court relied on the Supreme Court's recent interpretation of "necessary" in Section 251(d)(2), another section in the Telecommunications Act of 1996.[68] Using the Supreme Court's reasoning, the appellate panel concluded that "a statutory reference to 'necessary' must be construed in a fashion that is consistent with the ordinary and fair meaning of the word, *i.e.*, so as to limit 'necessary' to that what is required to achieve a desired goal."[69]

Finally, unless the statute is read to call for a test more exacting than the standard governing the FCC's general authority to promulgate rules, Section 202(h) would be a virtual nullity. There is nothing odd about a more exacting standard for retention than for promulgation. When an agency initially promulgates a rule, it must necessarily make predictive judgments that are entitled to considerable deference. But it makes logical sense to apply a more rigorous test after the agency has been able to evaluate the rule in light of real-world experiences. For that reason, courts, as well, when conducting review under the Administrative Procedure Act, apply a more exacting standard to retention than promulgation.[70] Moreover, it is noteworthy that, when it enacted an exacting standard for retention, Congress did not take the additional step of divesting the FCC of authority to re-promulgate repealed rules. Congress no doubt thought such

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[66] Section 251(c)(6), 47 U.S.C.A. § 251(c)(6) (2001), provides that incumbent local exchange carriers must permit collocation of equipment "necessary for interconnection."

[67] *GTE Service Corp. v. FCC*, 205 F.3d at 422.

[68] *See AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999).

[69] *GTE Service Corp. v. FCC*, 205 F.3d at 423, *citing AT&T v. Iowa Utilities Board*, 525 U.S. at 389-90.

[70] *See Office of Communication of United Church of Christ v. FCC*, 560 F.2d 529, 532 (2d Cir. 1977).

agency action improbable; in considering whether to promulgate a rule, any responsible agency would have to keep in mind the standard under which it must justify the rule a short while later.

In the case of the newspaper/broadcast cross-ownership rule, when the FCC first adopted the ban, it notably did not find any competitive harm that needed to be addressed but premised its action only on a "hoped for" gain in diversity.[71] On appeal, the rule was sustained based on deference to the FCC's predictive judgment.[72] Almost twenty-eight years later, no competitive justification for the rule has ever emerged. No unambiguous evidence, empirical or otherwise, reveals that the rule has served any purpose in the public interest, much less that the rule is necessary under changed competitive conditions in the media. Equally significant, the passage of time has shown an ever-growing profusion of media outlets and viewpoints and has rendered the Commission's speculative interest in ownership diversity little more than an unsupportable anachronism.

Nothing in any of the studies commissioned by the FCC, which are discussed below in Section IV, provides a basis under any definition of the word "necessary" to continue to implement the newspaper/broadcast cross-ownership rule. Neither does anything else in the record that was compiled in the *2001 Proceeding* provide a basis under any definition of the word "necessary" to retain the rule.

Indeed, not only is the rule no longer "necessary," it now actually disserves the public interest. As shown in Media General's initial and reply comments in the *2001 Proceeding* and updated in Attachment 4B to Professor Gentry's 2002 Statement, with diminished network compensation and the increasingly high cost of producing quality local news content for television stations in all communities, but particularly in smaller markets, at least forty local

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[71] *Second Report and Order*, 50 FCC 2d at 1073, 1075, 1078.

broadcast stations have cancelled local newscasts on their facilities since 1998.[73] Repeal of the rule would allow local newspapers, which are currently banned from owning television stations, to help reinvigorate these struggling news operations. Given all the record evidence showing the benefits of repeal and the lack of any evidence showing retention of the rule to be "necessary," any interpretation of Section 202(h) that results in continuation of the rule will unnecessarily weaken any package of media ownership rules that the FCC ultimately decides to retain.

B. Under Both *Fox* and *Sinclair*, Any Action Short of Repeal Would Not Only Violate Section 202(h) But Would Be Arbitrary and Capricious in Violation of the Administrative Procedure Act.

Retention of the newspaper/broadcast cross-ownership rule would represent arbitrary and capricious administrative action. In *Fox*, the United States Court of Appeals for the District of Columbia Circuit concluded that retention of the national television ownership cap violated Section 202(h) and was arbitrary and capricious in violation of the Administrative Procedure Act because the FCC had "addressed not *a single valid reason* to believe the [national television ownership cap] is necessary in the public interest, either to safeguard competition or to enhance diversity."[74] The *Fox* panel reached this conclusion after finding that at least five different reasons the FCC had asserted to show a link between the rule and competition or diversity were unsupported in the record.[75] Similarly, in concluding that the FCC's decision to retain the cable/television cross-ownership rule should be vacated, the *Fox* court based its action on several

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[72] *FCC v. National Citizens Comm. for Broad.*, 436 U.S. at 797.

[73] "Selected Press Accounts of Cutbacks in Local Television Newscasts: November 1998 through October 2002," Attachment B to 2002 Gentry Statement; Appendix B to Media General Reply Comments; Attachment A to 2001 Gentry Statement.

[74] *Fox*, 280 F.3d at 1043-44.

[75] *Id.* at 1041-44. ("The reasons the Commission gave for retaining the rule did not even purport to show the [national television ownership] Rule was necessary in the public interest, as required

reasons, including the Commission's "fail[ure] to consider the increased number of television stations now in operation, and . . . the Commission['s] fail[ure] to reconcile the decision under review with the *TV Ownership Order* [permitting television duopolies] it had issued only shortly before."[76] In *Sinclair*, the United States Court of Appeals for the District of Columbia Circuit found the television duopoly rule arbitrary and capricious because "the Commission ha[d] not provided any justification for counting fewer types of 'voices' in the local ownership rule than it counted in its rule on cross-ownership of radio and television stations."[77]

There is no rational basis for the FCC now to restrict newspaper/broadcast cross-ownership while (i) allowing both cable television/television cross-ownership and ownership of two television stations in a market and (ii) permitting broadcast ownership by a wide variety of other unregulated media such as the Internet and outdoor billboards that just as plausibly as newspapers compete with broadcast, cable, and other media the FCC regulates. There is no record, as *Fox* and *Sinclair* require, to support either of these disparities. Allowing them to continue would represent arbitrary and capricious action in violation of the Administrative Procedure Act for at least three reasons.[78]

First, after the *Fox* panel vacated the FCC's decision to retain the cable television/cross-ownership rule and the court on rehearing decided not to disturb this result, the Commission

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by [Section 202(h)] . . . Nor did the Commission attempt to link the listed facts to its decision to retain the national ownership cap. That, however, is precisely what Section 202(h) requires.")

[76] *Id.* at 1052.

[77] *Sinclair*, 284 F.3d at 162.

[78] As also argued at length at pages 76-80 of Media General's Comments, retention of the rule would also violate the Equal Protection Clause of the United States Constitution for many of the same reasons, a result that is further compelled by the *Fox* vacatur of the cable television/television cross-ownership rule.

indicated it did not intend to take steps to reinstate the rule.[79] As noted above, vacatur of the rule was due to the inconsistency between barring cable and television combinations while permitting combinations of two broadcast television stations in a market. In urging repeal of the cable/television cross-ownership rule in *Fox*, Time Warner had contended that the FCC's "concern with diversity cannot support an across-the-board prohibition of cross-ownership in light of the Commission's conclusion in the *TV Ownership Order* that common ownership of two broadcast stations in the same local market need not unduly compromise diversity."[80] The court agreed, finding the FCC was not free to ignore the recent changes in its television duopoly rule, and the court faulted the FCC for "mak[ing] no attempt . . . to harmonize its seemingly inconsistent decisions."[81] The court found any loss in diversity from allowing cable television and television broadcast combinations "would seemingly be no greater than the diminution attendant upon the combination of two broadcast stations in the same market, which combination the Commission recently sanctioned . . . ."[82]

Like *Fox*, *Sinclair* stands for the need for consistency in the regulation of media owners. Counting certain media outlets for purposes of measuring diverse and competitive "voices" in the regulation of local television ownership and a different set of "voices" in the regulation of local radio-television combinations is without justification, arbitrary and capricious.[83]

In the case of newspaper/broadcast cross-ownership, nothing in the record supports continuing to bar such combinations while local television duopolies and now cable

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[79] *See, e.g., 2002 NPRM* at ¶11 n.31; Doug Halonen, *FCC Opens the Door for Broadcast-Cable Combos*, ELECTRONIC MEDIA *available at* http://www.emonline.com/topstorys/091602fcc.html (last visited Dec. 31, 2002).

[80] *Fox*, 280 F.3d at 1052.

[81] *Id.* at 1052.

[82] *Id.* at 1053.

television/television cross-ownerships are allowed. As was true in *Fox*, any loss in diversity from allowing newspaper/broadcast combinations would be no greater than the "diminution attendant upon the combination" of two broadcast stations, which the FCC has already allowed, and upon the combination of cable television systems and broadcast stations, which the Court of Appeals for the District of Columbia Circuit has now ordered and the FCC has decided to accept. The Commission's failure to move promptly to repeal the newspaper/broadcast cross-ownership rule, in light of these other local media ownership reforms, represents arbitrary and capricious action.

Second, unlike other media such as broadcast stations and cable television, which the FCC regulates and counts as "voices" under some of its rules, the FCC does not regulate newspapers. As a result, any attempted quantification of the value, content, or competitiveness of an unregulated newspaper in measuring its "voice" relative to an FCC-regulated entity is almost certain to be indefensible. Nothing in the record of the *2001 Proceeding* or the FCC's recent studies[84] could guide the FCC to such a quantification, and nothing can. The FCC would now have great difficulty rationalizing and defending on appeal a decision to retain rules that apply beyond entities it directly regulates.

Third, at the same time, nothing in the *2002 NPRM* suggests that the FCC is contemplating regulation of a wider range of other media outlets,-such as the Internet and outdoor billboards, that the FCC does not currently regulate, and that just as plausibly as newspapers compete with currently regulated media in the sale of advertising and/or the delivery of information and content. Consequently, it would be arbitrary and capricious for rules such as

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[83] *Sinclair*, 284 F.3d at 164-65.

[84] *See* Section IV, *infra*.

cross-ownership to continue to apply to newspapers in any markets, large or small, while leaving unregulated other media outlets such as the Internet and outdoor billboards.

C. *Fox* and *Sinclair* Allow, and Indeed Implicitly Invite, the FCC To Find That Spectrum Scarcity No Longer Exists.

In evaluating the First Amendment claims of the litigants before them, the panels in both *Fox* and *Sinclair* noted that they were constrained by Supreme Court precedent from rejecting the concept of broadcast spectrum scarcity, which allows deferential review of broadcast structural regulations pursuant to a rational review test rather than the more stringent criteria of intermediate scrutiny.[85] Both courts, however, evidenced their interest in having the FCC lay the groundwork necessary for such a change in the appropriate legal standard.

According to the *Fox* panel, it was "not in a position to reject the scarcity rationale *even if we agree that it no longer makes any sense.*"[86] The *Sinclair* court similarly suggested that the Supreme Court might be receptive to a change if the proper record were put before it:

> Sinclair fails to acknowledge that the scarcity rationale adopted by the Supreme Court in *National Broadcasting Co. v. FCC*, . . . *Red Lion Broadcasting Co. v. FCC*, . . . is both at issue in television broadcasting and binding on this court . . . . In *FCC v. League of Women Voters*, . . . the Supreme Court stated: "We are not prepared . . . to reconsider our long-standing [scarcity rationale] without some signal from Congress or the [Commission] that technological developments have advanced so far that some revision of the system of broadcast regulation may be required." Absent such signals, the Court has refused to abandon the scarcity rationale.[87]

Leaving no doubt that reform of the constitutional standard is overdue, Judge Sentelle, in his partial concurrence in *Sinclair*, noted that "[p]erhaps with now-Chairman Powell's announcement that the 'time has come to reexamine First Amendment jurisprudence as it has

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[85] *Sinclair*, 284 F.3d at 167-68; *Fox*, 280 F.3d at 1046.

[86] *Id.*

[87] *Sinclair*, 284 F.3d at 161-62 (citations omitted).

been applied to broadcast media and bring it into line with the realities of today's communications marketplace,' the Supreme Court will take notice."[88]

The FCC is clearly the appropriate entity to establish that spectrum scarcity in the delivery of news and information no longer exists. The profusion of new spectrum outlets and uses -- direct broadcast satellite, Class A and low-power television stations, low-power FM radio, satellite radio, digital television, and the multicast potential many of them portend -- demonstrates conclusively that scarcity is now non-existent. Opponents of repeal have claimed that the large sums paid at auction for wireless spectrum and the continued disputes over allocation of wireless frequencies show spectrum scarcity still exists.[89] These arguments ignore, however, that the scarcity doctrine was developed by courts in regulating broadcast services, and, as a tool of First Amendment analysis, the doctrine does not apply to non-content based services. In articulating the test, the courts were addressing broadcast regulation.[90]

No court decision could have teed up the spectrum scarcity issue as clearly as *Fox* and *Sinclair* have done. Nothing -- factually or legally -- prohibits the FCC from heeding their invitation.[91] The Commission should seize this opportunity and finally acknowledge that the broadcast scarcity doctrine is no longer valid.

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[88] *Id.* at 172 (Sentelle J., partially concurring) (citation omitted).

[89] Consumers Union Group *et al.* Reply Comments in *2001 Proceeding* at 102-103.

[90] *See, e.g., FCC v. National Citizens Comm. for Broad.*, 436 U.S. at 795 ("As we have discussed on several occasions . . . , the physical scarcity of broadcast frequencies, as well as problems of interference between broadcast signals, led Congress to delegate broad authority to the Commission to allocate broadcast licensees in the 'public interest.'" (citations omitted).)

[91] Contrary to assertions by Consumers Union in the *2001 Proceeding*, no party is arguing that past Commission actions control the current Commission if it properly decides to abandon the broadcast scarcity doctrine. *See* Consumers Union Reply Comments in *2001 Proceeding* at 104-08. Rather, the Commission has been inconsistent in its view towards the continued viability of

D. With the Demise of the Spectrum Scarcity Rationale, the Newspaper/Broadcast Cross-Ownership Rule Must Be Judged Under More Restrictive First Amendment Standards.

As Media General pointed out in its initial comments in the *2001 Proceeding*, it is uncontested that broadcasters engage in activity protected by the First Amendment and that they are entitled "'under the First Amendment to exercise the widest journalistic freedom.'"[92] With the demise of the doctrine of broadcast spectrum scarcity, the restrictions imposed by the newspaper/broadcast cross-ownership rule must be justified under the same constitutional standards that apply to all other governmental regulation of protected speech. In this instance, the rule singles out newspaper owners for especially onerous restrictions and suppresses their broadcast speech in favor of the speech of non-newspaper licensees. The rule therefore should be reexamined under the standard of strict scrutiny,[93] which would require the FCC to demonstrate that such a sweeping ownership prohibition is the "least restrictive means available of achieving a compelling state interest."[94] The FCC's wholesale cross-ownership ban clearly could not withstand challenge under this most stringent level of scrutiny, which requires a demonstration "that the government's interest [in diversity of programming], no matter how

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the broadcast spectrum scarcity doctrine, and this inconsistency provides further support for its affirmative repudiation in this docket. *See, e.g.*, NAA Comments in *2001 Proceeding* at 102-07.

[92] Media General Comments at 72-73, *quoting Turner Broad. Sys. Inc. v. FCC*, 512 U.S. 622, 636 (1994). The newspaper/broadcast cross-ownership rule directly and materially restricts that freedom by banning newspaper owners from providing messages of their choice, in a medium of their choice, to television and radio audiences in their home communities. The rule also restricts the First Amendment rights of broadcasters by precluding them from providing messages in print in an in-market daily newspaper.

[93] *See Minneapolis Star & Tribune v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 583 (1983) (concluding that a regulation that singles out the press imposes a "heavy burden of justification on the State"); *New York Times v. Sullivan*, 376 U.S. 254 (1964). *See also Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) ("[G]overnment may [not] restrict the speech of some elements of our society in order to enhance the relative voice of others.")

[94] *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989).

articulated, is a compelling one."[95]

Even if reviewed under the less restrictive standard of intermediate scrutiny (which the Commission has already suggested should apply),[96] the newspaper/broadcast cross-ownership rule still does not pass constitutional muster. As Media General and other commenting parties demonstrated in the *2001 Proceeding*, the Commission is unable to show that the rule satisfies the three requirements embodied in that standard.[97] First, the Commission cannot establish, as it must and as it was unable to do when the rule was first adopted, that the recited risks to diversity and competition created by common ownership of newspaper and broadcast stations are "real, not merely conjectural."[98] Second, to sustain the rule, the Commission would have to "show a record that validates the regulation itself and not just the agency's abstract statutory authority to regulate."[99] Evidence of such a direct connection between the Commission's goals of diversity and competition was wholly lacking in the *2001 Proceeding*'s record. Finally, the FCC plainly cannot show that the newspaper/broadcast cross-ownership rule is "narrowly tailored to further a substantial government interest."[100] The newspaper/broadcast cross-ownership rule is a blunt instrument; it is a complete and categorical ban on all newspaper-broadcast combinations.

With scarcity gone, the newspaper/broadcast cross-ownership rule similarly fails. It lacks a foundation built on any documented harms, reaches too broadly, and unfairly singles out newspaper owners and broadcast operators who want to speak in a different local medium. The

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[95] *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 355 (D.C. Cir. 1998).

[96] *1998 Biennial Review Report*, 15 FCC Rcd at 11121 (stating that the newspaper/broadcast cross-ownership rule would be sustained against claims that it violates the First Amendment if it satisfies the intermediate scrutiny standard announced in *United States v. O'Brien*, 391 U.S. 367, 377 (1968)).

[97] Media General Comments at 74-76; NAA 2001 Comments at 111-14.

[98] *Turner*, 512 U.S. at 664.

[99] *Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126, 1129-30 (D.C. Cir. 2001).

Commission cannot defend it, and a reviewing court could not sustain it under established principles of First Amendment jurisprudence.

IV. The FCC's Own Recently Released Media Ownership Studies Also Compel Repeal of the Rule.

On October 1, 2002, the FCC released twelve studies examining various aspects of the current media marketplace.[101] Of these twelve empirical studies, six include information tangentially of relevance to the FCC's review of the newspaper/broadcast cross-ownership rule. While the studies may provide useful information to the FCC and the public, not one of them specifically provides a basis to evaluate whether the newspaper/broadcast cross-ownership rule is necessary in the public interest as a result of competition. Overall, these six studies demonstrate that the FCC lacks any empirical basis on which it can rely to continue implementation of the newspaper/broadcast cross-ownership rule as being necessary in the public interest as a result of competition. Individually, as shown below, the six studies show that the media marketplace has changed radically since 1975 when the rule was adopted and that repeal of the rule will not have a damaging effect on the public interest. In the end, these studies support repeal of the rule.

1. *Nielsen Consumer Survey.*

Study No. 8 released by the FCC reports the results of telephone interviews with 3,136 respondents whom Nielsen Media Research queried by telephone in late August and early September 2002 regarding their use of media.[102] The pool of consumers from which the respondents were drawn had recently completed television diaries in the February and May 2002

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[100] *League of Women Voters*, 468 U.S. at 380.

[101] FCC News, "FCC Releases Twelve Studies on Current Media Marketplace: Research Represents Critical First Steps in FCC's Fact Finding Mission," *supra* note 8.

[102] Nielsen Media Research, "Consumer Survey on Media Usage," FCC Media Ownership Working Group, 2002-8, September 2002 ("Study No. 8").

"sweeps" measurement periods.[103] As a result, the group's composition may have been slightly biased in favor of video watchers versus print readers. In addition, the average and median ages of the respondents were in their mid-forties,[104] so the pool of respondents likely was skewed against Internet usage.[105] Nonetheless, the results of the Nielsen consumer survey are telling in three principal ways: they demonstrate significant and growing reliance on the Internet for news and public affairs information; they show that cable and satellite subscription services have made measurable inroads in the use of over-the-air broadcast television; and they document substantial use of weekly newspapers, showing growing erosion of the market occupied by daily newspapers.

Internet Growth. Although the Nielsen study shows Americans still utilize a variety of more traditional media outlets to obtain local and national news, it also demonstrates that consumers are making substantial use of the Internet in seeking information about current events and public affairs. When asked to name the list of sources they had used for *local* news and current affairs within the preceding seven days, 18.8 percent, or almost one-fifth, of the group responded that they had used the Internet without hearing any list of suggested sources.[106] When those who did not volunteer use of the Internet were presented with a follow-up question asking specifically if they had used it as a source of *local* news and public affairs in the preceding week,

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[103] Study No. 8, "Description of Methodology," at 8.

[104] *Id.* at Table 095.

[105] U.S. Department of Commerce, Economics and Statistics Administration, National Telecommunications and Information Administration, *A Nation Online: How Americans Are Expanding Their Use of the Internet* at 14 (February 2002), *available at* http://www.esa.doc.gov/508/esa/USEconomy.htm. While this study shows that since December 1997, the age range of individuals more likely to be computer users has been rising, children and teenagers are still the most likely to be computer users.

[106] Study No. 8, Table 001.

another 18.5 percent, or again almost one-fifth of those questioned, answered affirmatively.[107] When the same questions were asked about *national* news, 21.3 percent, or even more respondents, volunteered that they had used the Internet.[108] Of those that had not volunteered their usage of the Internet to obtain *national* news, some 12.7 percent admitted such use when specifically queried.[109]

When a slightly smaller group of respondents, those who admitted to obtaining any *local* news and current affairs in the last week, were then asked if they had used the Internet to gain access to local news and current affairs, 34.2 percent responded affirmatively.[110] When a similar group was asked the same question but about *national* news and public affairs, a consistent 32.2 percent responded affirmatively.[111]

In the overall pool of respondents, a large number admitted access to the Internet. Some 79.2 percent, or almost four-fifths, responded that they have access at home, work or both.[112] The study's results also presaged the likely emergence of the Internet as an even more dominant source of news. When respondents were asked to list which media they might utilize more or less in the future, the Internet, among all listed media, was the source that gained the highest percentage of "more often" responses -- 24.7 percent.[113]

Cable Television/Satellite-Delivered Video. The Nielsen study results also showed significant growth in the role of subscription video services, like cable and satellite, in the daily

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[107] *Id.* at Table 002.

[108] *Id.* at Table 009.

[109] *Id.* at Table 010.

[110] *Id.* at Table 097.

[111] *Id.* at Table 098.

[112] *Id.* at Table 077.

[113] *Id.* at Tables 070 through 076.

lives of Americans. Of respondents who answered that television is one of their sources of *local* news and public affairs, 67 percent said that they watch such news on broadcast television channels, and 58 percent, or almost as many, said that they watch cable or satellite news channels.[114] When the same question was asked about sources of *national* news and current affairs, an even larger number, or 65.5 percent, listed cable or satellite news channels compared to 62.8 percent for broadcast news channels.[115]

A slightly smaller group of respondents, those who had said they get local or national news from various sources, were asked to name the source that they used most often. While almost one-third, or 33.1 percent, cited broadcast television channels, a surprisingly large number, or 23.3 percent, listed cable or satellite news channels, a figure that exactly matched the percentage of respondents who cited daily newspapers as the single source they use more often.[116]

Respondents who named a particular medium as the one that they used most often as their source for local or national news were also asked how likely, on a scale of one to five, they would be to use another suggested source if their preferred source were no longer available. A rating of "5" represented "much more likely" and "1" meant "no more likely." When the numbers for those who rated a specified substitute as either a "5" or a "4" were tallied, cable or satellite news channels beat out daily newspapers among all respondents except those who had

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[114] *Id.* at Table 008. As the notations in many of the tables state, percentages of responses may sum to more than 100 percent due to multiple responses.

[115] *Id.* at Table 016. Again, multiple responses are responsible for causing the percentages to total more than 100 percent.

[116] *Id.* at Table 020.

listed either weekly newspapers or magazines as their first preferred source.[117] When all respondents were queried about what source they would be more likely to use for national or local news and current affairs in the future, cable and satellite channels came in second behind the Internet.[118]

Finally, among the respondents, many more households paid to receive subscription video services than subscription print services. Specifically, when all respondents were asked to list the subscription services, if any, that they received, 62 percent said cable, 20.5 percent said satellite, 49.8 percent said daily newspaper, and 24.0 percent said weekly newspaper.[119] When the cable and satellite percentages are summed, they show that 83.4 percent of the respondents subscribed to a paid video source.[120]

Weekly Newspapers. The results for the survey also show that weekly newspapers have a strong response rate vis-à-vis dailies in terms of readership. When the respondents who had not mentioned reading a weekly newspaper in the last seven days were specifically asked if they had done so, almost one-third, or 27.5 percent, responded affirmatively.[121] When those respondents who had said they obtained their news from a newspaper were asked to specify whether it was a daily, weekly, or both, 10.2 percent said weekly only and 27.3 percent, or again almost one-third, said they subscribe to both.[122]

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[117] For those who listed broadcast as their number one source, *compare* Study No. 8, Table 021 *with* Table 024; for those preferring the Internet, *compare* Table 034 *with* Table 036; for those preferring radio, *compare* Table 058 *with* Table 061.

[118] *Id.* at Table 070 through Table 076.

[119] *Id.* at Table 079.

[120] *Id.*

[121] *Id.* at Table 081.

[122] *Id.* at Table 007.

2. *Outlet/Owner Survey.*

Another study that the FCC staff prepared compares the availability and ownership of media in ten different markets at three different points in time -- 1960, 1980, and 2000.[123] Included among the media that were counted were television and radio broadcast stations, cable systems, direct broadcast satellite systems, and daily newspapers.[124]

Echoing the factual evidence already presented in the *2001 Proceeding*, this study showed a dramatic increase in the availability of media outlets and the number of owners during the period from 1960 to 2000. The first table in the study, intended as an aggregate count of all media and owners in the ten markets, showed "percent[age] increases in [the number of] outlets ranged from 79% in Lancaster PA [sic] to a whopping 533% in Myrtle Beach SC [sic] with an average increase of almost 200% across all ten markets."[125] With respect to counts of actual owners, the percentage increases were slightly less dramatic because of consolidation following passage of the Telecommunications Act of 1996 but still "ranged from 67% in Altoona PA to a huge 283% in Myrtle Beach SC resulting in a 140% average increase in the number of owners for all ten markets from 1960 to 2000."[126] Even with consolidation, however, all but two markets experienced consistent growth in the number of owners. The New York market, with consolidation, did experience a net loss of two owners between 1980 and 2000, but the statistics

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[123] Scott Roberts, *et al.*, "A Comparison of Media Outlets and Owners for Ten Selected Markets (1960, 1980, 2000)," September 2002, FCC Media Bureau Staff Research Paper, 2002-1 ("Study No. 1"). The study states that the views it expresses do not necessarily reflect those of the agency.

[124] *Id.* at "II. Methodology." The study is not paginated, so citations are to various sections and tables.

[125] *Id.* at "III. Results – Table 1."

[126] *Id.*

for 2000 still showed that the market had over 100 owners, 114 to be exact.[127] (Over the same period, the number of media outlets in New York grew from 154 to 184.) Similarly, while the number of outlets in Kansas City grew from 44 to 53 between 1980 and 2000, the number of outlets remained constant at 33. The eight other smaller markets in the study experienced increases in the number of their owners, which from 1980 to 2000 grew an average of about twenty-five percent.[128]

In Table 2 of the study, the FCC staff provided more detail, showing the growth in outlets and owners by media type for each market in each of the three benchmark years. Such detail makes clear that the growth in broadcast, rather than the other outlets and owners accounted for virtually all of the dramatic increase in the overall aggregate media counts that had been presented in the first table.[129] What is most telling is that except for two markets, New York and Birmingham, the number of newspapers and their owners remained steady or declined.[130]

Next, Table 3 breaks out totals for radio and television stations according to whether they are commercial or non-commercial facilities. With the exception of a decline by one in the number of television owners in Lancaster, Pennsylvania, the only numbers in the charts that decreased are those for the number of commercial radio station owners in 2000 compared to 1980, and even with the decreases, between 10 and 41 owners remained in all but one market.[131]

Finally, Table 4 of the study tracks the growth in cable system availability in the ten markets. As the FCC staff writes, "[t]his table exhibits the tremendous growth of cable in each

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[127] *Id.* at Table 1.

[128] *Id.* at "III. Results – Table 1."

[129] *Id.* at "III. Results – Table 2" and Table 2.

[130] *Id.*

[131] *Id.* at Table 3.

of the ten markets, not only in the number of communities served, but also in channel capacity and subscriber count. Cable, virtually non-existent in 1960, has grown to be the dominant video delivery vehicle in the U.S."[132] Although the FCC staff also states that the table depicts a "declining number of cable system owners, reflecting consolidation," the table itself reveals that only in New York, where the number of owners has gone from 26 in 1980 to 9 in 2000, and in Lancaster, Pennsylvania, where the number has declined from six to three over the same period, has there been any decrease.[133]

This outlet/owner study shows that the overall trend in the number of outlets and owners in ten representative markets has been one of significant growth among all media except newspapers. Nothing in the study supports retention of the newspaper/broadcast cross-ownership rule, and nothing indicates repeal is unjustified.

3. *Pritchard Studies.*

Another Commission-published study that was authored by Professor David Pritchard of the University of Wisconsin-Milwaukee deals directly with the effect of newspaper/broadcast cross-ownership on diversity of viewpoint.[134] This review, which builds on an earlier study by Professor Pritchard published in December 2001,[135] examines the extent to which commonly-owned newspapers and television stations in a community speak with a single voice about important political matters. In his earlier study, Professor Pritchard had examined co-owned

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[132] *Id.* at "III. Results – Table 4."

[133] *Compare id.* at "III. Results – Table 4" *with* Table 4.

[134] David Pritchard, "Viewpoint Diversity in Cross-Owned Newspapers and Television Stations: a Study of News Coverage of the 2000 Presidential Campaign," FCC Media Ownership Working Group, 2002-2, September 2002 ("Study No. 2"). The study is not paginated. Citations assume that the first page following the "Executive Summary" is page 1.

media properties in three cities. In the latest report, he studies an additional seven co-owned properties in six cities and draws conclusions about all ten combinations.

Both studies examined the political "slant" of news content in co-owned media properties during the last 15 days of the Bush-Gore election. Professor Pritchard and his associates developed a numerical coding and grading system for quantifying this "slant." They then examined newspaper editorials, cartoons, staff opinion pieces, syndicated columns, guest opinion essays, reader's letters, and free-standing photographs as well as television news reports. From these, they computed an objective "slant co-efficient"" that allowed them to conclude whether a media outlet was pro-Bush or pro-Gore.[136]

As described below, each of Professor Pritchard's studies establish that common ownership does not have an effect, no less an adverse effect, on diverse presentation of news and opinions. In his first study, which focused on media properties in Milwaukee, Chicago, and Dallas, Professor Pritchard found no evidence of owners' influence on, or control of, news coverage by co-owned newspapers and broadcast stations. Rather, the empirical results led him to conclude that the cross-owned properties offered a "wealth" of diverse and antagonistic information.[137] He summarized his results and conclusions as follows:

> In other words, the evidence does not support the fears of those who claim that common ownership of newspaper and broadcast stations in a community inevitably leads to a narrowing, whether intentional or unintentional, of the range of news and opinions in the community . . . .

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[135] D. Pritchard, *A Tale of Three Cities: Diverse and Antagonistic Information in Situations of Newspaper/Broadcast Cross-Ownership*, 54 FED. COM. L.J. 31 (Dec. 2001) ("Pritchard 2001 Study").

[136] *Id.* at 38-41; Study No. 2 at 5-7.

[137] Pritchard 2001 Study at 49.

> This Article examined whether three existing newspaper/broadcast combinations in major markets provided information about the 2000 presidential campaign from "diverse and antagonistic sources." The results show clearly that they did provide a wide range of diverse information. In other words, the Commission's historical assumption that media ownership inevitably shapes the news to tout its own interests may no longer be true (if it ever was).[138]

In short, Professor Pritchard concludes that "the prohibition on newspaper/broadcast cross-ownership has outlived its usefulness."[139]

In the latest report released by the FCC, Professor Pritchard studied additional co-owned properties in New York, Chicago, Fargo, Hartford, Los Angeles, Phoenix and Tampa.[140] Of these new combinations, Professor Pritchard concludes that at those in Phoenix, Fargo, and Tampa and the News Corporation's co-owned properties in New York, the newspaper's and the television station's coverage exhibited slants that were "noticeably different" from each other.[141] In the latest study, he also adds the combination he already studied in Milwaukee to this group with "noticeably different" slant.[142] Of the other new combinations as well as the ones he already studied in Dallas and Chicago, he concludes that the "overall" slant of the newspaper's coverage of the 2000 campaign was not significantly different from the overall slant of the local television station's coverage.[143]

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[138] *Id.* at 49-51 (footnotes omitted).

[139] *Id.* at 51.

[140] In New York, he studied two newspaper-television combinations. In other markets, he studied just one combination. The combination which he studied in Tampa was Media General's WFLA-TV and *The Tampa Tribune*.

[141] Study No. 2 at 8.

[142] *Id.*

[143] *Id.* Professor Pritchard determined what constituted a meaningful difference between commonly-owned properties "via two-tailed, independent – sample T-tests . . . . [T]he tests suggested that there was an 83% chance that a difference of the type we found with the Fargo

Professor Pritchard also points out several facts demonstrating a lack of connection between the coverage provided by co-owned properties that are otherwise not obvious from his calculation of "slant" coefficients. First, the Tribune Company did not require its newspapers to coordinate their endorsements for president; of the four Tribune Company newspapers in the study, two (Chicago, Hartford) endorsed Bush, one (Long Island's *Newsday*) endorsed Gore, and one (*Los Angeles Times*) made no endorsement.[144] In addition, of the seven television stations in cross-owned combinations in which the newspaper endorsed Bush, two (WTIC in Hartford and KPNX in Phoenix) provided coverage of the presidential campaign that had a clear pro-Gore slant.[145]

While Professor Pritchard is more tempered in his conclusions in this latest study and also moves the combinations he previously studied in Dallas and Chicago out of the group exhibiting "noticeably different" slant, he nonetheless concludes,

> for the ten markets studied, our analysis of the coverage of [the] last two weeks of the 2000 presidential campaign suggests that common ownership of a newspaper and a television station in a community does not result in a predictable pattern of news coverage and commentary on important political events between the commonly-owned outlets. This is not to say that the news organizations under study presented a vast range of viewpoints or that their news coverage was helpful in enabling citizens to make informed choices on Election Day. It is to say, however, that we found no generalized evidence of ownership manipulation of the news in the situations of local cross-ownership we studied.[146]

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combination was a meaningful difference. For Milwaukee and Tampa, the statistic was 89%. For Phoenix, the statistic was 96%. For the News Corporations [sic] New York combination, the statistic was 99%. None of the other combinations under study had percentages higher than 65%, which we judged not adequate to support a finding of a meaningful difference." *Id.* at note 15.

[144] *Id.* at 9.

[145] *Id.*

[146] *Id.* at 10-11.

As Professor Pritchard more succinctly states in his executive summary, "the data suggest that common ownership of a newspaper and a television station in a community does not result in a predictable pattern of news coverage and commentary about important political events in the commonly owned outlets."[147]

Another empirical study by Professor Pritchard submitted last spring in the Commission's local radio ownership proceeding (MM Docket Nos. 01-317 and 00-244) corroborates these results.[148] This analysis, which is attached for convenience as Appendix 5, surveyed the growth in local media outlets providing local content in five variously-sized markets at ten-year intervals from 1942 to 2002 as well as in 1995, just prior to adoption of the Telecommunications Act of 1996. In these five markets, which included Lisbon, North Dakota; Florence, South Carolina; Rockford, Illinois; Syracuse, New York; and New York, New York, Professor Pritchard found a consistent increase in the availability of diverse local sources of news and information that was not undercut by any trend in consolidation of ownership:

> The data presented in this study make it clear that the number of media outlets focusing on news and information about local events has increased steadily over the years. That the rate of increase has accelerated since the Telecommunications Act of 1996 was passed suggests that the economic consolidation that ensued did not diminish diversity of local media content. The patterns in all five of the communities we studied were similar.[149]

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[147] *Id.* at "Executive Summary."

[148] David Pritchard, "The Expansion of Diversity: A Longitudinal Study of Local Media Outlets in Five American Communities," March 2002, attached as Appendix A to Viacom Inc.'s Comments in MM Docket Nos. 01-317 and 00-244, filed March 27, 2002. This radio ownership proceeding has now been combined in the instant docket and the record incorporated by reference herein. *2002 NPRM* at ¶11 n.31.

[149] Appendix 5 at 22. While Media General currently owns newspaper and television properties in the Florence-Myrtle Beach DMA, these acquisitions were made only at the very tail end of the time period under review in Professor Pritchard's radio study.

As Professor Pritchard concludes, "[t]he study presented here further challenges the wisdom of focusing on issues of ownership to attempt to maximize access to diverse media outlets."[150]

Thus, all three Pritchard studies support repeal of the newspaper/broadcast cross-ownership rule. While Media General has never seen a connection between ownership and viewpoint and, therefore, questions why studies regarding content are even necessary, Professor Pritchard's reviews put to rest once and for all that, no matter what the market size, common ownership does not result in common approaches to the presentation of news and public affairs and does not harm the presentation of diverse viewpoints and diverse local content.

4. *Measurement of TV News and Public Affairs.*

Another study authored by members of the FCC staff sought to measure the news and public affairs broadcast by television stations for purposes of comparing the performance of stations owned by one of the four largest broadcast networks relative to that of their affiliates.[151] This study also provides empirical information demonstrating that repeal of the newspaper/broadcast cross-ownership rule would be unlikely to harm the delivery of news and public affairs. In fact, it suggests repeal would have beneficial effects.

The study attempted to measure the quantity and quality of news and public affairs programming. For an assessment of quantity, the study tallied the hours of programming aired during the November 2000 sweeps period.[152] For quality, it used three measures: (1) ratings for

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[150] *Id.*

[151] Thomas C. Spavins, *et al.*, "The Measurement of Local Television News and Public Affairs," undated ("Spavins Study"). The study states that the views it expresses do not necessarily reflect those of the agency. The study is not paginated. Citations assume that the first page following the "Executive Summary" is page 1.

[152] *Id.* at 1.

local evening news programs; (2) awards from the Radio and Television News Directors Association; and (3) an award called the Silver Baton issued at the A.I. Dupont Awards.[153]

Among network affiliates, the study found a "systematic divergence" in performance between stations that were co-owned with a newspaper and all other affiliates.[154] "For each quality and quantity measure in the analysis, the newspaper affiliates exceed the performance of other, non-newspaper network affiliates."[155]

This study confirms what Media General already knows: through convergence, television stations can deliver a better, faster, and deeper news product. As the long list of awards given to Media General's co-owned properties that is listed in Appendix 4 shows, convergence will benefit the public interest.

5. *Advertising Substitutability.*

The results of a study by another FCC staff member on the substitutability of local newspaper and television advertising additionally support repeal of the newspaper/broadcast cross-ownership rule.[156] This paper examines the issue of whether there is a single local advertising market or several distinct local markets for newspaper, radio, and television advertising by estimating the ordinary own-price and cross-price elasticities of substitution for newspaper, radio, and television advertising.[157] While the author cautions that there are

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[153] *Id.*

[154] *Id.* at 4.

[155] *Id.*

[156] C. Anthony Bush, "On the Substitutability of Local Newspaper, Radio and Television Advertising in Local Business Sales," September 2002, FCC Media Bureau Staff Research Paper, 2002-10 ("Study No. 10"). The study explicitly states that the views it expresses are not those of the agency. While the study also discussed radio advertising, because Media General's focus is on newspaper and television, it does not address that aspect of the report.

[157] *Id.* at 4.

limitations inherent in the underlying data,[158] the results suggest that local newspaper and television advertising are complementary inputs in the sales efforts of local businesses.[159] As such, they are in separate markets, meaning there is no justification from an economic standpoint for prohibiting their common ownership.

First, the study estimates the ordinary own-price elasticities of substitution for newspaper, radio, and television advertising. It determined the estimated own-price elasticity of television advertising to be – 0.7960.[160] This finding that television advertising's own-price elasticity is less than one in absolute value indicates that the industry is operating in the inelastic portion of its demand curve. The result suggests that, if a single firm acquired control of all the television stations within a DMA, that firm could profitably raise price. Next, the study finds that the estimated own-price elasticity of newspaper retail advertising is – 1.0406.[161] This finding that newspaper retail advertising's own-price elasticity is just slightly greater than one in absolute value is consistent with a high likelihood that, if there were a single firm controlling all newspapers within a DMA, that firm could profitably raise prices. These results indicate that television advertising and newspaper retail advertising are each likely to constitute separate markets.

The study also finds that the cross-price elasticities for newspaper retail advertising and local television advertising are negative.[162] This result implies that newspaper and television advertising are complements. That is, if the price of newspaper advertising increases, then not

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[158] *Id.* at 12-13.

[159] *Id.* at 14.

[160] *Id.* at 12.

[161] *Id.*

[162] *Id.*

only does the amount of newspaper advertising decrease, but the quantity of television advertising also decreases. In like fashion, if the price of television advertising increases, then not only does the amount of television advertising decrease, but the amount of newspaper advertising also decreases.

The author's results demonstrate that television and newspapers do not, from an economic standpoint, directly compete for advertising, a result that further supports the elimination of the newspaper/broadcast cross-ownership rule. Indeed, given the author's finding of a complementary relationship between newspaper and television advertising, a company that owned both a newspaper and a television station in the same DMA has less incentive to increase its newspaper or television advertising prices than does a company that just owns either a newspaper or a television station in that same DMA. This study shows that the Commission has no reason to find that the newspaper/broadcast cross-ownership rule is "necessary in the public interest as the result of competition."

6. *Consumer Substitutability Among Media.*

In another study released by the FCC, Professor Joel Waldfogel of the University of Pennsylvania attempts to answer the question whether changes in the availability or use of some media bring about changes in the availability or consumer use of other media.[163] While his study may shed some light on consumer preferences for various media, it provides no insight into the effect of changes in media ownership on media usage, and, as noted below, suffers from a serious methodological error and also fails to synthesize earlier studies it cites with the more recent data it presents.

[163] Joel Waldfogel, "Consumer Substitution Among Media," FCC Media Ownership Working Group, 2002-3, September 2002 ("Study No. 3").

Professor Waldfogel's study rejects the view that various media are entirely distinct and provides purported evidence of what he describes as substitutability by consumers between and among various media outlets. In Part I, he presents examples of consumer substitution across media.[164] In Part II, he presents examples of substitution between various combinations of media.[165] Professor Waldfogel notes that, for "technical reasons," the true extent of substitution may be greater than indicated in his study.[166] The most notable finding is that consumers would readily substitute Internet usage for television viewing, both overall and for news.[167]

Professor Waldfogel's conclusions, however, are extremely suspect due to a serious methodological error in the first part of his paper. The study claims that the measure of "households using television" represents an overall measure of television viewing, excluding cable.[168] In reality, the "households using television" measure has generally captured not just the viewing of broadcast television stations but also the viewing of cable and satellite television programming and the videotaping of television programming.[169] Contrary to the claims in his study, this measure does not capture just broadcast television viewing. Any substitution, therefore, that the study finds between a particular medium (such as newspapers) and television is not really a valid measure of substitution between that medium and broadcast television, but rather a measure of substitution between that medium and all television viewing, including the

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[164] *Id.* at 5-24.

[165] *Id.* at 25-41.

[166] *Id.* at 6-7.

[167] *Id.* at 3.

[168] *Id.* at 14.

[169] *See, e.g.*, National Cable Communications (visited Dec. 30, 2002) <http://www.spotcable.com/asp/abo/glossary.asp?section=publicresources&sub=glossary>; Charter Media (visited Dec. 30, 2002)

viewing of over-the-air television and cable and satellite services and the videotaping of television programming.

Even if Professor Waldfogel's paper were flawless, it provides no basis to assess whether the current cross-ownership rule remains necessary in the public interest as the result of competition. Whether consumers substitute from one medium to another or not is not a sufficient basis for finding the cross-ownership rule to be necessary in the public interest. Consumers no doubt substitute among newspapers or substitute among weekly newspapers or news magazines or substitute among Internet sites, but there is no rule at the FCC -- or any other government agency -- limiting the cross-ownership of such media assets. Acquisitions of such assets are, however, reviewed by appropriate antitrust authorities. Demonstration of substitutability or the presence of a "market," from an antitrust standpoint, is not a basis that the newspaper/broadcast cross-ownership rule, or any rule, remains necessary in the public interest.

In summarizing his conclusions, Professor Waldfogel refers to results from earlier papers he has authored on voting behavior;[170] however, there is nothing in the present study that examines voting behavior or that could be used to support or contradict any previous study of voting behavior. The present study is sufficiently different in its purpose and methods that its conclusions should not be compared with the voting behavior studies for purposes of testing for consistencies. Thus, the references to and reliance upon the voting behavior studies are beside the point when evaluating the conclusions Professor Waldfogel posits regarding consumer substitution among media. In short, Professor Waldfogel's study is of extremely limited utility

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<http://www.chartermedia.com/cm/aboutcable/glossary.asp>; Nielsen Media Research, *Your Guide to Reports & Services* at 2 (1996).

[170] Study No. 3 at 40.

in analyzing the newspaper/broadcast cross-ownership rule, even if its methodological flaws are overlooked.

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By themselves, these six studies do not provide any foundation for retaining the newspaper/broadcast cross-ownership rule. They separately and collectively undermine any attempt to find that the rule is necessary in the public interest as the result of competition. They show the dramatic growth of new media and most, with the exception of newspapers, of the more traditional media outlets; the increasing use of new media by the American public; the lack of any connection between content and ownership; the better public service provided by newspaper-owned television stations when compared to other television stations; the complementary nature of newspaper and television advertising from a competitive standpoint; and, at most, that consumers would readily substitute Internet usage for television viewing. In short, they presage no damaging effect from elimination of the newspaper/broadcast cross-ownership rule. Ultimately, these studies support its repeal.

V. Diversity of Ownership Never Did and Now Clearly Does Not Bear a Credible Link to Diversity of Viewpoint, and the Commission's Responsibility To Foster Competition, Localism, and Innovation Requires Repeal of the Rule.

A. Given That Diversity of Ownership Is, at Best, an "Aspirational" Proxy for Diversity of Viewpoint, the FCC Cannot Reasonably Determine That the Newspaper/Broadcast Cross-Ownership Rule Is Necessary in the Public Interest.

In the course of remanding the FCC's decision on the national television ownership cap, the court in *Fox* addressed the FCC's reliance on diversity as a rationale in support of that rule.[171] Even though the panel posited that diversity of ownership may not always be an irrational proxy

[171] *Fox*, 280 F.3d at 1042-1043, 1047.